



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY RELIEF GRANTED;
APPELLANT'S MOTION FOR SUMMARY RELIEF DENIED: July 9, 2007

CBCA 337, 338, 339

THE BOEING COMPANY, SUCCESSOR-IN-INTEREST OF
ROCKWELL INTERNATIONAL CORPORATION,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Richard J. Ney and S. Jean Kim of Chadbourne & Parke LLP, Los Angeles, CA,
counsel for Appellant.

Kaniah Konkoly-Thege, Office of Legal Services, Environmental Management
Consolidated Business Center, Department of Energy, Cincinnati, OH, counsel for
Respondent.

Before Board Judges **GILMORE**, **POLLACK**, and **McCANN**.

McCANN, Board Judge.

We consider here cross-motions for summary relief filed by appellant, The Boeing Company, successor in interest of Rockwell International Corporation (Rockwell), and respondent, the Department of Energy (DOE). The issue to be decided here is whether a contractor who violates the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, can recover its defense costs as allowable costs under the contract. Only the issue of entitlement is before us.

Facts

1. On January 8, 1975, DOE entered into contract AT (29-2)-3533 (renumbered DE-AC04-76DP03533) with Rockwell for the management, operation, and maintenance of the Rocky Flats Nuclear Weapons Plant in Colorado. Appellant's Exhibit 3 at 1.¹ Modification M087 covered performance from January 1, 1986, through December 31, 1988. *Id.*, app. B at 1.

2. In July 1989, Mr. James Stone, on behalf of himself and the United States, brought a *qui tam* action under the FCA against Rockwell in the United States District Court for the District of Colorado. Respondent's Exhibit 1. In the complaint, Mr. Stone alleged that Rockwell had misrepresented or failed to disclose certain information to DOE relating to environmental matters at the Rocky Flats Plant. The complaint alleged that Rockwell had violated numerous federal and state environmental statutes.

3. In 1993, Rockwell asked DOE to reimburse it for attorney fees and other defense costs that it was incurring in defending itself in the suit. By letter dated April 22, 1993, DOE advised Rockwell:

Payments on behalf of any actions relating to the so-called false claims suit against Rockwell are considered to be provisional payments pending the final outcome of that case. It is our present understanding that the Department of Justice has declined participation in any such pending case and there is no present expectation of recovery on behalf of the United States. DOE reserves the right to evaluate the final outcome of the case and to seek reimbursement from Rockwell for any amount paid in the event these underlying assumptions are later determined to be erroneous.

Respondent's Exhibit 2.

4. By letter dated December 6, 1995, the contracting officer advised Rockwell that on or about November 13, 1995, the Department of Justice had filed a motion for leave to intervene in the case. Respondent's Exhibit 4. He indicated that Rockwell should be "advised that any defense costs related to this case incurred by Rockwell after that date are

¹ "Appellant's Exhibit" refers to the exhibits attached to the Declaration of Richard J. Ney (Dec. 13, 2006), which was filed with appellant's cross-motion for summary judgment. "Respondent's Exhibit" refers to the exhibits attached to respondent's motion for summary judgment.

unallowable under Contract DE-AC04-76DP03533.” As of December 8, 1995, DOE had provisionally paid Rockwell approximately \$4,000,000 in attorney fees and related defense costs. Respondent’s Exhibit 19.

5. On November 19, 1996, the district court permitted the United States to intervene. Respondent’s Exhibit 5. Soon thereafter, in December 1996, the Government and Mr. Stone filed an amended complaint asserting claims for violation of the FCA, common law fraud, breach of contract, payment by mistake, and unjust enrichment. Appellant’s Exhibit 25. As in the initial complaint, these claims related to professed violations of environmental laws such as the Resource Conservation and Recovery Act and the Clean Water Act.

6. By letter dated April 17, 1998, DOE informed Rockwell of its intention to disallow the Stone defense costs DOE had paid on a provisional basis prior to November 1995. The contracting officer indicated:

The proposed cost disallowance is based on the fact that these costs are unallowable under the allowable cost clause of the relevant contract(s), No. DE-AC04-76DP03533 for the operation of the Rocky Flats Plant. In addition, said costs were incurred as a result of Rockwell’s failure to exercise prudent business judgment and are not reasonable nor were they incurred for work within the scope of the contract. The payment of these costs is also contrary to public policy, the “sovereign act doctrine,” and the Major Fraud Act of 1988, as amended.

Respondent’s Exhibit 6.

7. On April 1, 1999, the jury found Rockwell liable for violating the FCA on three claims. It found for Rockwell on the remaining seven claims. Respondent’s Exhibit 7. The jury found that the time period of Rockwell’s violations of the FCA was from April 1, 1987, through September 30, 1988. It awarded compensatory damages in the amount of \$1,390,775.80. *Id.*

8. On May 13, 1999, the district court ordered entry of final judgment awarding treble damages under the FCA in the amount of \$4,172,325, plus \$5000 for each of the three violations. Appellant’s Exhibit 26. The court noted that the jury did not decide the Government’s common law fraud claim because the Government had withdrawn it near the end of the trial. The court dismissed that claim with prejudice. *Id.* On June 10, 1999, the district court entered an amended final judgment against Rockwell in the same amounts. Respondent’s Exhibit 8.

9. On September 24, 2001, the FCA judgment against Rockwell was affirmed on appeal by the United States Court of Appeals for the Tenth Circuit. Respondent's Exhibit 9.

10. On September 30, 2005, the contracting officer rendered a final decision denying Rockwell's claim for defense costs in the amount of \$11,344,081.14 and demanding that Rockwell repay with interest the provisional payments for defense costs paid to Rockwell in the amount of \$4,060,669. Respondent's Exhibit 19.

11. The contract includes the following relevant provisions:

¶ 54: 970.5204-13 ALLOWABLE COSTS, BASE FEE AND AWARD FEE (APR 1984) (MODIFIED)

_____ _____

- (c) Allowable Cost. The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the Contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and are determined to be allowable pursuant to this paragraph (c). The determination of the allowability of cost hereunder shall be based on: (1) reasonableness, including the exercise of prudent business judgment; (2) consistent application of generally accepted accounting principles and practices that result in equitable charges to the contract work; and (3) recognition of all exclusions and limitations set forth in this clause or elsewhere in this contract as to types or amounts of items of cost. Allowable cost shall not include the cost of any item described as unallowable in paragraph (e) of this clause except as indicated therein. Failure to mention an item of cost specifically in paragraph (d) or paragraph (e) shall not imply either that it is allowable or that it is unallowable.
- (d) Items of Allowable Cost. Subject to the other provisions of this clause, the following items of cost of work done under this contract shall be allowable to the extent indicated:

. . . .

- (16) All costs incurred by the Contractor with respect to any and all liabilities, claims, demands, damage costs, or penalties (such as civil sanctions including fines), arising out of, or related to environmental, safety and health activities, including costs incurred with respect to investigation, removal, remedial action, ground and surface water or other clean-up of hazardous, toxic or contaminated material(s), except for those costs that result from conduct identified in subparagraph (e)(17)(ii) of the clause entitled, "Allowable Costs, Base Fee and Award Fee."

- (e) Items of Unallowable Costs. The following items of costs are unallowable under this contract to the extent indicated:

....

- (32) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the Government where the Contractor, its agents or employees, is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

Appellant's Exhibit 3.

12. Effective March 28, 1984, DOE promulgated a final rule establishing the Department of Energy Acquisition Regulation (DEAR). 49 Fed. Reg. 11,922 (March 28, 1984). The DEAR sets forth its purpose as follows:

- (b) The purpose of the DEAR is to implement the Federal Acquisition Regulation (FAR) where further implementation is needed, and to supplement the FAR when coverage is needed for subject matter not covered in the FAR. The DEAR is not, by itself, a complete document as it must be used in conjunction with the FAR. When a FAR Part or Subpart is adequate for use without further DOE implementation, no mention is cited in the DEAR. Therefore the order of use is (1) FAR; (2) DEAR.

48 CFR 901.101(b) (1984).

13. In 1986, the FAR read as follows, in pertinent part:

31.205-47 Defense of fraud proceedings.

(a) Definitions.

....

“Fraud,” as used in this subsection, means (1) acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents, . . . and (3) acts which violate the False Claims Act, 31 U.S.C., sections 3729-3731

(b) Costs incurred in connection with defense of any: (1) criminal or civil investigation, grand jury proceeding, or prosecution; (2) civil litigation; or (3) administrative proceedings such as suspension or debarment, or any combination of the foregoing, brought by the Government against a contractor, its agents or employees, are unallowable when the charges, which are the subject of the investigation, proceedings, or prosecution, involve fraud or similar offenses (including filing of a false certification) on the part of the contractor, its agents or employees, and result in conviction (including conviction entered on a plea of nolo contendere), judgment against the contractor, its agents or employees, or decision to debar or suspend, or are resolved by consent or compromise.

48 CFR 31.205-47 (1986).

14. On March 4, 1986, DOE issued a “Notice of Proposed Rulemaking” disallowing costs of fraud proceedings. The proposed rule stated, in terms essentially identical to the language of the FAR provision then in effect:

970.3102-20 Defense of fraud proceedings.

(a) Definitions.

....

“Fraud,” as used in this subsection, means---

(1) Acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents,

....

(3) Acts which violate the False Claims Act, 31 U.S.C., sections 3729-3731

(b) Costs incurred in connection with defense of any---

(1) Criminal or civil investigation, grand jury proceeding, or prosecution;

(2) Civil litigation;

....

(4) Similar proceedings (including those associated with the filing of any false certification), or any combination of the foregoing, brought by the Government against a contractor, its agent or employee, are unallowable when the charges, which are the subject of the investigation, proceedings, or prosecution, involve fraud or similar offenses (including filing of a false certification) on the part of the contractor . . . and result in . . . judgment against the contractor

51 Fed. Reg. 7469, 7473 (Mar. 4, 1986).

15. Pursuant to modification M097, effective January 1, 1987, Rockwell and DOE amended Clause 54 - ALLOWABLE COSTS, BASE FEE AND AWARD FEE by adding provision (32) to clause 54(e), "Items of Unallowable Cost" (Finding 11). Respondent's Exhibit 16.

16. DOE's final rule issued on January 14, 1987, adopted, virtually unchanged, the language used in the proposed rule (Finding 14). 52 Fed. Reg. 1602, 1609-10 (Jan. 14, 1987).

Opinion

Summary relief is appropriate when the record contains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The parties agree that there are no material facts in dispute in this case. The issues in dispute here involve statutory and regulatory interpretation. Such issues are matters of law that can be appropriately decided by summary relief. *Santa Fe Pacific Railroad Co. v. United States*, 294 F.3d 1336, 1340 (Fed. Cir. 2002).

DOE contends, and Rockwell disputes, that the language contained in the contract, specifically modification M097, makes unallowable Rockwell's costs of defending against the FCA allegations for which it was found liable. Clause 54(e)(32) makes unallowable costs for defense of fraud or similar proceedings where the contractor is found liable. Finding 11. Since Rockwell was found liable for violating the FCA, we must decide whether a charge of violating the FCA constitutes a charge of "fraud or similar proceeding" under contract clause 54(e)(32). We find that it does.

The arguments in favor of this interpretation are overwhelming. To begin with, the FCA has always been considered by the courts to be a "fraud" statute. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551 (1943) (The "chief purpose" of the False Claims Act "was to provide for restitution to the government of money taken from it by fraud."); *LeBlanc v. United States*, 50 F.3d 1025, 1027 (Fed. Cir. 1995) ("The False Claims Act provides a framework for detecting and countering fraud against the government."); *United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 342 F.3d 634, 642 (6th Cir. 2003) ("The fact that the False Claims Act does not require proof of all the traditional elements of a fraud claim, such as scienter, does not mean that the False Claims Act is not an anti-fraud statute.").

Similarly, the Federal Acquisition Regulation (FAR) considers the FCA to be a fraud statute. FAR 31.205-47 specifically defines fraud to mean acts of fraud or corruption and acts which violate the FCA. Finding 13.

Rockwell argues, however, that FAR 31.205-47 does not apply to the contract. Indeed, Rockwell seems to argue that this section and possibly many sections, if not the entire FAR, does not apply. Rockwell's position lacks merit.

The FAR is the regulation that governs acquisition by the Federal Government.² When interpreting federal contracts these regulations are to be looked to for guidance. They are the implementing regulations for federal government contracts. Accordingly, it is completely appropriate to look to the FAR to determine what the term fraud means in a government contract.

Furthermore, the relevant section of the DEAR specifically states that the purpose of the DEAR is to implement and supplement the FAR. Finding 12. It specifies that the DEAR is not, by itself, a complete document and that it must be used in conjunction with the FAR. *Id.* It also states that “[w]hen a FAR Part or Subpart is adequate for use without further DOE implementation, no mention is cited in the DEAR. Therefore the order of use is (1) FAR; (2) DEAR.” *Id.* Moreover, the FAR also states that agency regulations, like the DEAR, implement or supplement the FAR.³

Rockwell’s assertion that FAR 31.205-47 does not apply here is tortured at best. Essentially, it contends that if the DEAR covers a situation, then the FAR does not apply or becomes irrelevant. Such an interpretation is simply an incorrect way to interpret the relationship between the FAR and the DEAR. In fact, if Rockwell’s interpretation were to

² In 1986, the FAR provided:

1.101 Purpose

The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR.

....

1.103 Applicability

The FAR applies to all acquisitions as defined in Part 2 of the FAR, except where expressly excluded.

48 CFR 1.101, 1.103.

³ See footnote 2.

be adopted, it would make the FAR and the DEAR virtually impossible to apply on a day-to-day basis. The correct way to interpret the FAR and the DEAR is together and in harmony, much in the way various provisions of a contract are interpreted. The DEAR further implements and supplements the FAR. They are not mutually exclusive as Rockwell seems to argue. If the DEAR does not cover something, it is perfectly appropriate and necessary to look to the FAR for guidance. To do otherwise would be an improper application of government procurement regulations.

Rockwell further argues that the term “fraud” should not include FCA violations because the DOE rule defining FCA violations as fraud was pending at the time of contract signing and did not become effective until two weeks later. This argument is unpersuasive. The fact that this rule was pending at the DOE at the time of contract signing (Finding 14) and is completely consistent with the existing FAR definition of fraud provides further weight to the position that a violation of the FCA is fraud under the contract. Indeed, the final DOE rule issued after the effective date should also be used to define fraud under the contract because that rule is more of a clarification of, than a change to, the term “fraud.” See *Fluor Hanford, Inc. v. United States*, 66 Fed. Cl. 230, 234 (2005) (“Amendments [to regulations] may have retroactive application only if they can be viewed as ‘clarifications’ rather than substantive changes . . .”).

Rockwell also argues that its being found liable for FCA violations does not bring it under clause 54(e)(32) of modification M097 because the district court and the Tenth Circuit found it not guilty of specific counts of fraud. Again, Rockwell’s argument is without merit. The findings by the district and circuit courts that Rockwell was not guilty of fraud is not relevant to whether violations of the FCA constitute “fraud or a similar proceeding” under clause 54(e)(32). As we have already found, the FCA is a fraud statute in and of itself. A court’s decision on a separate count does not alter or change that.

Rockwell proceeds to argue that, at best, there is a conflict between clause 54(e)(32) and 54(d)(16), the clause that makes allowable “all costs” relating to environmental health and safety. Finding 11. It argues that clause 54(d)(16) should prevail over clause 54(e)(32). Again, Rockwell’s position here is unsound.

It is true, of course, that clause 54(d)(16) covers as allowable “[a]ll costs incurred by the Contractor with respect to any and all liabilities, claims, demands, damage costs, or penalties . . . arising out of or related to environmental, safety and health. . . .” Finding 11. Granted, this is a very inclusive clause. However, it is not totally inclusive. It cannot be interpreted to require complete and comprehensive indemnification of all of Rockwell’s costs incurred regardless of the reason. First, this clause only applies to environmental, safety, and health costs; and second, the contract cites specific exceptions to the allowability of all costs

incurred. Clause 54(c), entitled “Allowable Costs,” explicitly states that “[a]llowable costs shall not include the cost of any item described as unallowable in paragraph (e) of this clause except as indicated therein.” *Id.* Here, clause 54(e)(32) specifically states that “costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding . . . where the Contractor . . . is found liable to a charge of fraud or similar proceeding” are not allowable. Clause 54(e)(32), where it applies, is a specific exception to the allowability of “all costs” covered by clause 54(d)(16). There is no conflict here between the two clauses.

Rockwell further argues that clause 54(e)(32) does not apply because the *qui tam* action here was not brought by the Government as is ostensibly required by the clause, but was instead brought by Mr. Stone. Rockwell’s argument again lacks merit. When Mr. Stone filed his *qui tam* action, the Government had not yet intervened. In that sense, then, accordingly to Rockwell, the Government was not a party to the action and the case had not technically been “brought by the Government.” However, the case had been brought under the FCA, a statute specifically designed to prevent contractors from defrauding the Government. Moreover, it had been brought by a relator who was acting on behalf of the Government. “[A] *qui tam* relator is, in effect, suing as a partial assignee of the United States.” *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 n.4 (2000).

Rockwell would have us believe that clause 54(e)(32) draws a distinction between cases actually instituted by the Government and those instituted by *qui tam* relators, acting for the Government, regardless of the outcome of the case. We disagree. The purpose of clause 54(e)(32) is to make unallowable costs incurred by contractors in defending against fraud actions where they are found guilty. The FCA allows individuals other than the Government to bring actions on behalf of the Government. We do not believe that at the time of contract signing the parties intended to draw a distinction between defense of fraud costs in actions brought first by *qui tam* relators and those brought first by the Government. Accordingly, we find the “brought by the Government” requirement in clause 54(e)(32) to be satisfied by a relator initiating the action. In this case, the Government did, in any event, intervene as a party, further satisfying the “brought by the Government” requirement. And finally, here the relator was dismissed from the suit because he lacked the jurisdictional prerequisites to be an original source. In such an instance, the case becomes a case brought by the Attorney General. In *Rockwell International Corp. v. United States*, 127 S.Ct. 1397, 1411-12 (2007), the Supreme Court held that “[t]he elimination of Stone leaves in place an

action pursued only by the Attorney General, that can reasonably be regarded as being ‘brought’ by him”⁴

The Board has carefully considered all remaining arguments set forth by Rockwell and has found them to lack merit.

Decision

**RESPONDENT’S MOTION FOR SUMMARY RELIEF is GRANTED.
APPELLANT’S MOTION FOR SUMMARY RELIEF is DENIED.**

R. ANTHONY McCANN
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

HOWARD A. POLLACK
Board Judge

⁴ The Board notes that there is a clear distinction between a case being “brought by the Government” as those terms are used in clause 54(e)(32) and whether the party who brought the *qui tam* action was an original source. In *Rockwell International Corp.*, the Supreme Court addressed the issue of whether Mr. Stone fulfilled the statutory requirements of an original source when he brought the action. It found that he did not. This is a very different inquiry than whether the Government brought the *qui tam* action. Even if, as here, Mr. Stone was not an original source, his bringing of the *qui tam* action fulfilled the requirement of being “brought by the Government” for purposes of clause 54(e)(32). This is so since Mr. Stone was standing in the shoes of the Government when he brought the action, and also since the case became one brought by the Attorney General from its inception once the relator was dismissed for failing to meet the jurisdictional prerequisites.